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Nos. 83-476 and 83-636

In the Supreme Court of the United States

OCTOBER TERM, 1983

DOMINIC IAVARONE, PETITIONER

v.

UNITED STATES OF AMERICA

DAVID BATTISTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in declining to instruct the jury that a "mere bettor" cannot violate 18 U.S.C. 1084.

2. Whether the district court erred in declining to emphasize the differences between "bettors" and "bookmakers" in connection with its instructions defining "engaged in the business of betting or wagering" within the meaning of 18 U.S.C. 1084 and conducting an "illegal gambling business" within the meaning of 18 U.S.C. 1955.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1-A3)[1] is not reported.

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[1] "Pet. App." refers to the appendix to the petition in *Dominic Iavarone* v. *United States*, No. 83-476. "Supp. App." refers to the supplemental appendix to the petition in *David Battisti* v. *United States*, No. 83-636. "C.A. App." refers to the joint appendix filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals (Pet. App. A2-A3) was entered on July 26, 1983. A petition for rehearing filed by petitioner Battisti (Supp. App. A6-A7) was denied on August 18, 1983. The petition for a writ of certiorari in No. 83-476 was filed on September 20, 1983, and the petition for a writ of certiorari in No. 83-636 was filed on October 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted of conspiracy to transmit wagering information by interstate wire, in violation of 18 U.S.C. 371 (Count 1); transmitting wagering information by interstate wire, in violation of 18 U.S.C. 1084 and 2 (Count 2); and use of an interstate facility to carry on an illegal gambling business, in violation of 18 U.S.C. 1952(a)(3) and 1955. Petitioners Iavarone and Battisti were sentenced as follows: on Count 1, five years' imprisonment and a $5000 fine (Iavarone) and one year's imprisonment and $10,000 fine (Battisti) on Count 2, concurrent terms of two years (Iavarone) and one year and one day (Battisti); on Count 3, both received five-year terms of probation to follow their prison sentences. The court of appeals affirmed by judgment order (Pet. App. A1-A3).

1. The evidence at trial showed that between February and June 1978, petitioners were participants in a sports betting operation in Bristol, Pennsylvania (C.A. App. 260a-261a). Petitioners took bets involving substantial sums from Thomas DiNola. During the 1978 baseball season, DiNola called petitioners' operation as often as two or three times a day and placed bets of $1000 to $3000 per game (*id.* at

249a). In addition to placing bets with petitioners' organization, DiNola received "layoff" bets from petitioners' operation (*id.* at 519a-520a), *i.e.*, bets made to adjust the volume of wagers a bookmaker is carrying on each side of a particular contest (see C.A. App. 525a). DiNola also relied on petitioners' organization to provide him with "line information," *i.e.*, the point spreads between teams for a particular game (*id.* at 518a-521a).

On June 5, 1978, the Federal Bureau of Investigation conducted a warrant-authorized search of petitioners' headquarters in Bristol. The office was protected by three locked doors (C.A. App. 443a). In the room that housed the gambling operation, agents discovered petitioners and four other men, twelve telephones, three radios and two television sets (C.A. App. 403a-404a, 430a-431a). The agents also found a fire burning and some partially burned gambling records in a trash can (C.A. App. 403a, 430a, 436a-437a). While the agents were present, telephones in the room rang repeatedly (C.A. App. 423a); when the agents answered the phones, the callers did not respond (*ibid.*).

An FBI special agent, who was qualified as an expert witness on bookmaking, sports betting and gambling matters (C.A. App. 510a), testified that based on the records and tape-recorded conversations in the case, it was his conclusion that petitioner Iavarone was a manager or partner in the Bristol gambling operation and that petitioner Battisti was a "phone man" at the operations headquarters (*id.* at 515a). The agent concluded that neither was a mere bettor and explained that mere bettors would not use twelve telephones, would not disseminate line information and would not have "customers" (*id.* at 572a).

Evidence from wiretap interceptions depicted petitioner Iavarone's managerial role. On May 3, 1978, petitioner Iavarone called Caesar Pesarini, who was at the headquarters, gave Pesarini a number where petitioner could be

reached and checked on the progress of the betting (C.A. App. 112a). The expert's characterization of Battisti as a "phone man" was fully supported by a taped conversation of June 2, 1978, in which petitioner Battisti accepted a series of bets in a phone conversation with Thomas Strong (*id.* at 124a-130a).

The district court charged the jury that with respect to 18 U.S.C. 1084, it must be shown that petitioners were "engaged in a regular course of conduct or series of transactions involving time, attention and labor devoted to betting or wagering for profit rather than casual or isolated transactions" (C.A. App. 757a). The court explained that a bookmaker "is but just one example of a person who is 'engaged in the business of betting or wagering.' " The court added that bookmakers "take bets; they receive them; and they handle or service those bets. Bookmakers have customers; they distribute information; and they lay off bets" (*id.* at 758a).

With respect to 18 U.S.C. 1955, the court instructed that the term "gambling," as used in the statute, includes, but is not limited to, bookmaking (C.A. App. 761a). After explaining the elements of the offense, the court charged that a "mere bettor or customer of a gambling business may not properly be said to conduct the business" (*id.* at 764a).

The court of appeals affirmed by judgment order, merely reciting the issues presented by petitioners (Pet. App. A2-A3).

ARGUMENT

1. Petitioners contend (83-476 Pet. 10-15; 83-636 Pet. 15-16) that the district court's jury instructions were erroneous because the district court failed to instruct the jury expressly that "bettors" cannot violate 18 U.S.C. 1084,

which prohibits the interstate transmission of bets or wagers by one who is engaged in the business of betting or wagering. This contention is without merit.

No court of appeals has ever overturned a conviction under 18 U.S.C. 1084, on the ground that the defendant was only a bettor. Instead, the courts have consistently concluded that "[i]f a defendant is professionally engaged in making bets and wagers," then he is within the reach of Section 1084. *Sagansky* v. *United States*, 358 F.2d 195, 201 (1st Cir. 1966). See also *United States* v. *Sellers*, 483 F.2d 37, 45 (5th Cir. 1973), cert. denied, 417 U.S. 908 (1974) ("[W]e conclude that the statute properly construed reaches the activities of these professional gamblers who, as the jury found, conducted their activities through the use of interstate telephone facilities * * *); *United States* v. *Stonehouse*, 452 F.2d 455, 456 (7th Cir. 1971) ("the activity of a professional gambler * * * is prohibited by § 1084(a) * * *"); *United States* v. *Anderson*, 542 F.2d 428, 436 (7th Cir. 1976); *Truchinski* v. *United States*, 393 F.2d 627, 629 (8th Cir. 1968), cert. denied, 393 U.S. 831 (1969).[2]

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[2]The legislative history of Section 1084 supports this construction, making it clear that the statute reaches professional gamblers as well as bookmakers. In his letter recommending the legislation, the Attorney General noted that law enforcement "is not interested in the casual dissemination of information with respect to football, baseball, or other sporting events between acquaintances." However, he added, the bill was intended to reach "professional gamblers" even if they claim, "I just like to bet. I just make social wagers." S. Rep. 588, 87th Cong., 1st Sess. 3 (1961). The Senate Report noted that the statute was designed to reach the individual users of interstate wire facilities who are "engaged in the business of betting or wagering," and to "close another avenue utilized by *gamblers* for the conduct of their business." (*Id.* at 2) (emphasis added). Likewise, the House Report noted that the statute was designed to assist the states in the enforcement of "their laws pertaining to *gambling*, bookmaking, and like offenses" (H.R. Rep. 967, 87th Cong., 1st Sess. 1 (1961) (emphasis added). See also 107 Cong. Rec. 16535 (1961) (remarks of Rep. McCulloch).

Thus, the issue is not, as petitioners suggest, whether they were "bettors" or "bookmakers," but rather whether they were engaged in the business of betting or wagering.[3] On that issue, the district court's instruction was clearly correct. The court made plain to the jury that the government was required to prove beyond a reasonable doubt that petitioners were "engaged in a regular course of conduct or series of transactions involving time, attention and labor devoted to betting or wagering for profit rather than casual or isolated transactions" (C.A. App. 757a). That instruction correctly defined for the jury the term "engaged in the business of betting or wagering" within the meaning of Section 1084.[4] Indeed, it even specified bookmaking as one possible way of violating the statute. Since the instruction embodies a correct interpretation of Section 1084 and the decision below upholding it conflicts with no decision of this Court or any court of appeals, further review is unwarranted.

2. Petitioners argue (83-476 Pet. 18-19; 83-636 Pet. 15-16) that the error in not defining the difference between bettors and bookmakers was highlighted by the jury's

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[3]Nor is there any merit to petitioner Battisti's assertion (83-636 Pet. 14) that the indictment charged a crime more narrowly than 18 U.S.C. 1084 provides. While the indictment does refer to a " 'sports bookmaking' business," (C.A. App. 87a) it repeatedly charges petitioners with accepting wagers and bets as part of their business of betting and wagering (C.A. App. 86a-89a). Thus, the government was not limited by the indictment to proving that petitioners were "bookmakers."

[4]Petitioners characterize (83-476 Pet. 5; 83-636 Pet. 8) themselves as mere customers of a bookmaker, but this assessment ignores the compelling evidence that they were engaged in the business of wagering and betting. When arrested they had 12 telephones in their office. During the gambling operation, there was evidence that petitioners quoted odds, had customers, and placed layoff bets. Thus, there was ample evidence from which a factfinder could have inferred that they were "bookmakers." *A fortiori*, there was sufficient evidence to prove that petitioners were engaged in the business of wagering or betting within the meaning of 18 U.S.C. 1084.

request for "the definition of a bookmaker and a bettor" (C.A. App. 796a). But the court responded properly to that request.

After discussing the question with counsel, the court proposed to repeat the definition of "bookmaker" that had been given in the initial charge. As to the term "bettor," the court proposed to tell the jury that a bettor is simply a person who places a bet, and that the jury should use its common sense in applying the term. Petitioners' counsel agreed that that instruction was acceptable (C.A. App. 804a). After further discussion, the court once again outlined its proposed charge and added, "I take it, now Mr. Nastasi and Mr. Simone [counsel for petitioners], you are satisfied with this approach" (*id.* at 806a). Neither counsel voiced any objection.

The court then recalled the jury and instructed it as follows (*id.* at 807a):

> [I]n reply to [your] note, may I tell you that you will recall from my charge that I told you that bookmakers take bets, they receive them, and they handle or service these bets. Bookmakers have customers, they distribute line information and they lay off bets. I would ask that you use your ordinary common sense to determine the meaning of the word "bettor." I might say that one common sense definition of the meaning of the word is simply that a bettor is a person who places a bet.

The court then advised the jurors that if they wanted a fuller discussion of the point, the court would read the charge on Counts 2 and 3, and explain the essential elements of the statutes involved in those counts. The jury expressed no desire for a more complete instruction (*id.* at 807a-808a). Following the delivery of the supplemental instruction, neither defense counsel voiced any objection (*ibid.*). Accordingly, the court's instruction in response to

the jury's request was not only consistent with other court authority in defining a bookmaker, see *United States* v. *Scavo*, 593 F.2d 837 (8th Cir. 1979); *United States* v. *Tomeo*, 459 F.2d 445, 447 (10th Cir.), cert. denied, 409 U.S. 914 (1972), but also was at the time satisfactory to petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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